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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1110

GRAND LODGE HALL ASSOCIATION, I. O. O. F. OF INDIANA, A CORPORATION, ET AL.,

Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.,

Appellees.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

Appellee's Motion to Dismiss or Affirm (R. 321) is supported only by a "Statement of Matters and Grounds Making Against the Jurisdiction of this Court", filed under paragraph 3 of Rule 12 (R. 313-320). This Brief is, therefore, a reply to such statement.

Reference is made to the Jurisdictional Statement, filed under Rule 12 for a statement of the Nature of the Action and the Assignments of Error (R. 282-294).

(This brief is not intended to be an exhaustive treatment of the merits of the appeal, but only to meet the appellees' contention that the constitutional issues involved are either foreclosed by authority or otherwise so unsubstantial as to warrant dismissal.)

I.

The "Previous Decisions of This Court" Asserted to Support the Decision of the Supreme Court of Indiana and to Foreclose Appellants' Contentions, Are Not Controlling.

The inapplicability of *Wisconsin & Michigan R. Co.* v. *Powers* (1903) 191 U. S. 379, 48 L. Ed. 229, *Salt Company* v. *East Saginaw* (1872) 80 U. S. 373, 20 L. Ed. 611, and *Christ Church* v. *Philadelphia County* (1861) 65 U. S. (24 How.) 300, 16 L. Ed. 602, has already been pointed out in the Jurisdictional Statement (R. 291-292). We believe, moreover, that Appellee's statement of *Wisconsin & Michigan R. Co.* v. *Powers* (1903) 191 U. S. 379, 48 L. Ed. 229, is slightly misleading. Mr. Justice Holmes did not deny "consideration" in the ordinary sense. "* * * the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present." (191 U. S. 386.) The element not "present" was that promise and detriment must be inducements each for the other. The reason given for failing to find this element was stated as follows:

> "The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law."

The reason thus expressed does not apply to the instant case, for here the only "benefits" to be anticipated were benefits to the public at large. Neither appellant corporations, their incorporators, nor the donors of their property could anticipate or be motivated by "benefits" other than self satisfaction arising from altruism. Surely this does not preclude inference of an intent to promise tax exemption in return for the irrevocable dedication of assets to public charity. On the contrary, it should properly be inferred that enhancement by tax exemption of the income available for charity was held out as an inducement for incorporation and donation.

Appellees are also in error in asserting that the exemption in *Salt Company* v. *East Saginaw* (1872) 80 U. S. 373, 20 L. Ed. 611 was to "corporations" alone. It was a general exemption conditioned upon engaging in salt production, but requiring no permanent or irrevocable action for its enjoyment, and, for that and other reasons inapplicable here, was held to be non-contractual.

The additional case cited, *Grand Lodge F. and A. Masons of Louisiana* v. *New Orleans* (1897) 166 U. S. 143, is exactly on a par with *Christ Church* v. *Philadelphia County* (1861) 65 U. S. (24 How.) 300, 16 L. Ed. 602 and inapplicable for the same reason; namely, total lack of consideration for the grant, as is evidenced by the following quotation:

> "The alleged contract for exemption was not contained in the charter—as in other cases where such exemption has been sustained—since the lodge had already pledged its revenues to charitable purposes; and when the act was passed it gave no additional pledge, and promised nothing which it had not already promised, and was bound in honor to perform."

II.

Appellees Do Not Sucessfully Distinguish the Cases Relied Upon by Appellant.

While it is true that in *Piqua State Bank* v. *Knoop* (1853) 16 How. (57 U. S.) 369; 14 L. Ed. 977 the court held that "the provisions of the statute under which such banks were organized * * * was a contract", the reasons for so holding exist *a fortiori* in the instant case. The Piqua case presented, and this case does not, elements of private benefit to incorporators which subsequently were held to warrant inference of intent not to contract. We suggest also that there is to be found, in Indiana, constitutional and judicial history subsequent to 1852 affording as much basis for the general thesis that the charter of a corporation is a contract, not subject to subsequent alteration as mere matter of legislative policy, as there was in Ohio in 1853. Further discussion of this background will be found in Subdivision III of this brief.

The attempted distinction of *Home of the Friendless* v. *Rouse* (1869), 8 Wall. (75 U. S.) 430, 19 L. Ed. 451 and *Washington University* v. *St. Louis* (1869), 8 Wall. (75 U. S.) 439, on the basis that these corporations were chartered by special act and not by general law, is negatived by the decision of this court in *Piqua State Bank* v. *Knoop* (1853), 16 How. (57 U. S.) 369.

The Piqua Bank was not specially chartered but was formed under a general law as are appellants here.

III.

The Clear Intention to Create a Contractual Tax Exemption, Required by the Decisions of This Court Cited by Appellees Under "C" of Their "Statement of Matters Making Against Jurisdiction", Is Manifest by Indiana Acts 1921, Ch. 246, § 9, Particularly When Viewed in the Light of Prior and Contemporaneous Legislative History, Which We Submit the Indiana Supreme Court Misinterpreted and Misapplied.

(a) The two Indiana cases cited by the Supreme Court of Indiana, *Orr* v. *Baker* (1853), 4 Ind. 86, and *City of Indianapolis* v. *The Grand Master, etc.* (1865), 25 Ind. 518, did not involve any question of contractual tax exemption, but only the determination of the extent of general exemptions, admittedly non-contractual, granted respectively to churches, and "charitable institutions"; applying in the one case to "every building erected for religious worship and the land upon which the same is situate" and in the other to "every building erected for the use of any benevolent or charitable institution and the land upon which the same is situate." In each case, the court construed the exemption to be inapplicable to such portion of the buildings and real estate in question as were not used for religious worship or charitable and benevolent purposes, but were rented to earn income, notwithstanding that such income was applied to "religious" or "charitable" use.

These cases might properly have been (and were) urged as limiting the *extent* of the exemption granted appellants by the Act of 1921, but the Indiana Court expressly decided that § 9 of the Act of 1921 *did exempt* real estate of the character held non-exempt in *Orr* v. *Baker* and *Indianapolis* v. *Grand Master*.

To say that since the Act of 1843 and the Act of 1852,

which were admittedly not contractual, gave a narrower exemption than the Act of 1921, the legislative policy thereby indicated evidences an intent *not to promise* by the Act of 1921, involves an obvious non-sequitur.

(b) The various revisions of the exemption provisions of the general tax law occurring from 1919 to 1921 and referred to by the Supreme Court of Indiana do not in any important particular depart from the previous practice of limiting religious, educational, and charitable exemptions of real estate to that real estate *used and occupied* for religious, educational or charitable purposes, a circumstance in striking contrast to the broader exemptions contained in "An Act for the organization of foundation or holding companies and prescribing their powers and duties," and indicating, at least with respect *to the extent* of the exemption, a departure from the previous practice, not a continuation of it.

(c) The inclusion of this broader exemption, applying to real estate used to earn income devoted to exempt purposes, in an act for the incorporation of foundation and holding companies for promoting religious, educational and charitable purposes rather than in the general tax law, and making the exemption depend upon the ownership of the property by a particular kind of artificial entity rather than upon the physical *use* of the property, indicate an intent to make the exemption a contractual charter privilege, particularly when viewed in the light of Indiana constitutional history and judicial decision.

(1) Abuses flowing from corporate special privilege were a particular concern of the Indiana Constitutional convention which adopted the present constitution and resulted in the provision of Article 11, § 13 that "Corporations, other than banking, shall not be created by special act, but shall be formed under general laws".

(2) But the same Constitutional Convention rejected a proposed amendment to this very article which would have added the words "and that laws conferring corporate powers may be altered and repealed". 2 Debates in Indiana Convention 1850, (Indiana Historical Collections Reprint) p. 1875-1876.

(3) In various decisions, beginning shortly after the adoption of this constitution, the contractual nature and inviolability of corporate charters has been recognized and emphasized by the Supreme Court of Indiana.

Aurora etc. R. Co. v. *Holthouse* (1855), 7 Ind. 59, 61.

Smead v. *Ind'pls. etc. R. C.* (1858), 11 Ind. 104, 110.

Edwards v. *Jagers* (1862), 19 Ind. 407, 415.

Downing v. *Ind. St. Bd. of Agric.* (1891), 129 Ind. 443, 444, 452.

(4) The peculiar inviolability of a corporate charter conferred for educational or benevolent activities, to be supported by donations of public spirited citizens, is asserted in the above cited case of *Edwards* v. *Jagers* (1862), 11 Ind. 415, wherein the court quoted with approval the following language from Justice Story's opinion in the Dartmouth College case:

> "The Crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its franchises should be taken away by due process of law. From the very nature of the case, there was an implied contract, on the part of the Crown, with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing

up, and founded on a valuable consideration, that the Crown would not revoke or alter the charter, or change its administration without the consent of the corporation. There was, also an implied contract, between the corporation itself and every benefactor, upon a like consideration, that it would administer his bounty according to the terms, and for the object stipulated in the charter." *Dartmouth College* v. *Woodward* (1819), 4 Wheaton 518, 689; as quoted in 11 Ind. 415, 416.

(5) Since the Indiana legislature of 1921 is not to be presumed ignorant of Indiana constitutional history or judicial decisions, the fact that on March 11, 1921, there was adopted a law authorizing the creation of foundation and holding companies and granting as one of their privileges the power to receive property by gift or devise and to hold it exempt from taxation so long as held for authorized corporate purposes, and on the same day there was adopted a revision of the general tax law confirming other less extensive exemptions depending wholly upon *use* of property for like purposes, indicates very strongly that the legislature of 1921 intended the tax exemption of § 9 of Chapter 246 of the Acts of 1921 to partake of all the well recognized contractual inviolability of other provisions of the corporate charter and negatives any legislative intent to grant mere *"privilegia favorabilia"*.

The general principle of construing tax exemptions narrowly and in favor of the sovereign, and its corollary that the sovereign will not be held to have "bargained away" its taxing power except in clear cases are not to be controverted, but neither principle is so patently decisive of the instant case as to make the questions involved "unsubstantial" or frivolous. Among decisions of this court cited by appellees and the Supreme Court of Indiana as directly controlling, *not one* involved a tax exemption *embedded in a corporate charter*, whereas prior decisions of this

court have uniformly held that charter exemptions *were contractual*, notwithstanding the general principles previously mentioned.

Since *Dartmouth College* v. *Woodward* (1819), 4 Wheaton 519, the contractual nature of corporate privileges has been generally recognized, and as heretofore pointed out, certainly as emphatically in Indiana as elsewhere. Since the right to exist as a corporation, and to pursue the authorized purpose of the charter, are recognized in Indiana, as elsewhere, as rights protected by the contract clause from subsequent legislative impairment, the very fact that the incorporating act includes tax exemption as one of the corporate privileges is of itself evidence of the "intent to promise" found absent in the cases denominating such grants mere *privilegia favorabilia*.

Certainly this appeal is not one to be dismissed "upon authority" or distinguished, without opinion, from the long line of cases establishing the contractual nature of corporate charters, and the sanctity of contractual tax exemption. On the contrary, if appellees are to prevail at all, it must be because *Piqua Bank* v. *Knoop*, *University* v. *People*, *Asylum* v. *New Orleans*, and even *Dartmouth College* v. *Woodward* are either to be overruled or limited to an extent to which they have not yet been limited.

Respectfully submitted,

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